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Nos. 76-1121, 76-1153, and 76-1162

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN BROADCASTING COMPANIES, INC., ET AL., PETITIONERS

v.

WRITERS GUILD OF AMERICA, WEST, INC., ET AL.

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC., PETITIONER

v.

WRITERS GUILD OF AMERICA, WEST, INC., ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WRITERS GUILD OF AMERICA, WEST, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Contrary to the Union's contention (Un. Br. 3–5, 23–24), the fact that some of the hyphenates per-

formed "(A) to (H)" writing functions during the strike does not undermine the Board's finding that they performed no "rank-and-file" writing work during the strike. The (A) to (H) functions were expressly excluded from the contractual definition of bargaining unit work. The collective bargaining agreement provides that the performance of (A) to (H) functions "by Producers, Directors, Story Supervisors * * * shall not be subject to this Basic Agreement and such services shall not constitute such a person a writer hereunder" (Pet. App. 33a; A. 237, 318, 322). Indeed, the Union did not consider the (A) to (H) functions as bargaining unit or struck work when it disciplined the hyphenates. Although certain strike rules explicitly prohibited writing for struck employers (Pet. App. 36a), the Union did not charge the hyphenates with violating these rules, but only with violating the general rule prohibiting members from crossing picket lines (Pet. App. 44a–45a, 59a).

Furthermore, the (A) to (H) functions do not involve any substantial writing but only perfunctory editing of finished written scripts where unforeseen contingencies or technical problems arise prior to completion of the film. Where changes of a substantial nature are required, they are made by writers pursuant to the terms of the Union's contract (Pet. App. 34a; A. 59, 66, 74–76, 143–145; Tr. 429–430, 1310–1311). Thus, a producer's performance of the (A) to (H) editorial functions is analogous to a factory foreman's operation of production line machinery to

correct rank-and-file employees' errors or to instruct rank-and-file employees in new production methods; although such actions may be physically similar to rank-and-file work, the supervisory authority and judgment required to perform them effectively place them above the rank-and-file level.

For these reasons, the Board, adopting the finding of the Administrative Law Judge (ALJ), properly concluded that the (A) to (H) functions performed by the hyphenates during the strike were not work that would have been performed by rank and file employees had they been on the job. These were "functions which the parties have acknowledged do not constitute work reserved to [the Union's] non-hyphenate members under the agreements, but rather are accepted as a normal part of the duties and responsibilities of the executives and supervisors * * * employed by the employers involved" (Pet. App. 35a). And, as shown in our main brief (Bd. Br. 15 n. 14), there can be no doubt that the hyphenates were supervisors who possessed and exercised the authority to adjust grievances or bargain collectively on behalf of the Employers, within the meaning of Section 8(b)(1)(B), National Labor Relations Act, as amended, 61 Stat. 141, 29 U.S.C. 158(b)(1)(B).

2. The Union (Un. Br. 30–31) and *amicus curiae* American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) (Am. Br. 28–35) contend that the "deprivation theory" for finding a violation of Section 8(b)(1)(B) advanced in the Board's brief (Bd. Br. 16–17) was not the basis for the Board's decision in this case. Both the Union and the AFL–

CIO acknowledge (Un. Br. 30; Am. Br. 30 n. 13) that the ALJ found a violation of Section 8(b)(1)(B) on reasoning similar to that in the Board's brief,[1] but conclude that the Board affirmed the ALJ only on the theory of its earlier decisions in *Chicago Typographical Union No. 16* (*Hammond Publishers, Inc.*), 216 NLRB 903, enforced, 539 F. 2d 242 (C.A.D.C.), petition for certiorari pending, No. 76-688, and *New York Typographical Union No. 6* (*Triangle Publications, Inc.*), 216 NLRB 896, which rested on a "carryover" theory.[2] The Union and the AFL-CIO are in error.

[1] The ALJ stated (Pet. App. 63a-64a):

"It is clear that [the Union's] action in this case violated the plain meaning of the statute without the necessity of resort to statutory exegesis. To illustrate: A person performing the function of a director acts in a managerial or supervisory capacity, which normally includes the adjustment of grievances of actors, actresses, craft employees and others. One occupying the position of a producer normally has a similar capacity and similar duties with respect to employee grievances. In addition, if the film is being shot on distant location the producer has authority to negotiate on the spot agreements with local unions. Thus when [the Union] prevented or sought to prevent, such hyphenate members from going to work in their managerial and supervisory capacities as producers and directors during the strike, [the Union] obviously coerced and restrained their employers in the selection of those specific producers and directors for the purpose of collective bargaining and the adjustment of grievances of employees working during the strike within the plain meaning of the statute."

[2] In those cases, the Board held that discipline of a supervisor with grievance adjustment or collective bargaining functions for crossing a picket line substantially to perform supervisory functions during a strike would likely affect the manner in which the supervisor performed those functions in the future. Cf. *Bakery and Confectionery Workers, Local Unions 24 and 119* (*Food Employers Council, Inc.*), 216 NLRB 917 (no carryover effect likely where the supervisors performed more than a minimum amount of rank-and-file work during the strike).

The Board expressly affirmed "the rulings, findings, and conclusions of the Administrative Law Judge" (Pet. App. 11a), with the single exception that it found one additional violation—that the Union violated Section 8(b)(1)(B) not only by disciplining but also by threatening to discipline the hyphenates, including production executives (Pet. App. 12a-13a). These circumstances show that the Board did adopt the deprivation theory for finding a violation of Section 8(b)(1)(B) (n. 1, *supra*), and that the footnote citation of *Hammond Publishers* and *Triangle Publications, supra* (Pet. App. 13a n. 6) merely supplies an alternative basis for the Board's decision.[3] The Board's intent is confirmed by other decisions where the Board has found violations of Section 8(b)(1)(B), in whole or in part, on the theory that the union discipline deprived employers of the services of their supervisors for the performance of supervisory duties,

[3] The AFL-CIO contends (Am. Br. 30 n. 13) that the deprivation theory is inconsistent with the Board's holding that union discipline violates Section 8(b)(1)(B) by carrying over to affect subsequent performance of supervisory functions. The AFL-CIO, noting that the Board has refused to find an unlawful carryover effect where disciplined supervisors performed more than a minimal amount of rank-and-file work during the strike (see *Food Employers Council, supra*), concludes that the deprivation theory would require a finding of a violation in such cases. However, just as no carryover effect is likely where supervisors are disciplined for performing primarily rank-and-file work, employers will not be deprived of true supervisory services by union action which prevents supervisors from performing substantial nonsupervisory work. Therefore, union discipline of supervisors for performing rank-and-file work would be lawful under both the carryover and the deprivation theories.

which included grievance adjustment or collective bargaining, during a strike.[4]

3. The AFL–CIO and the Union contend (Am. Br. 31–33; Un. Br. 31–32) that the deprivation theory proves too much: first, it would result in a finding of a violation of Section 8(b)(1)(B) even without a showing that the supervisors, in fact, would have been called upon during the strike to perform grievance adjustment or collective bargaining functions; second, the effect on the employer would allegedly be the same if the supervisors had decided not to cross the picket line of their own volition, rather than as a result of the threat of union discipline. This contention does not withstand analysis.

As noted in the Board's brief (Bd. Br. 18–19), Section 8(b)(1)(B) makes it unlawful for a union to restrain or coerce "an employer in the *selection* of his representatives for the purposes of collective bargaining or the adjustment of grievances" (emphasis added). When an employer confers upon a supervisor collective bargaining or grievance adjustment authority, he has selected that person as his representative for those purposes whenever the occasion for the exercise of such authority arises; the selection is not withdrawn on those days when the supervisor may have no occasion to engage in collective bargaining or

[4] See *Wisconsin River Valley District Council* (*Skippy Enterprises, Inc.*), 218 NLRB 1063, 1064, enforced, 532 F. 2d 47 (C.A. 7); *Warehouse Union Local 6* (*Associated Food Stores, Inc.*), 220 NLRB 809, 810; *Glaziers and Glassworkers Local Union No. 1621* (*Glass Management Association*), 221 NLRB 509, 511; *Local 322, Laborers' Int'l Union* (*Kingsley Drilling*), 229 NLRB No. 139, May 24, 1977.

grievance adjustment. Accordingly, where, as a result of union discipline or the threat thereof, a supervisor with such authority refrains from crossing a picket line to perform his normal supervisory functions, the employer, without more, is deprived of the representative he has selected for collective bargaining or grievance adjustment purposes.[5]

Equally unpersuasive is the argument that, since the effect on the employer is the same whether a supervisor refuses to cross the union's picket line of his own volition or because of the union's threat of discipline, the latter factor cannot be sufficient to establish a violation of Section 8(b)(1)(B). This

[5] The Union contends that the only supervisors who were disciplined were those "who *did* show up for work and with respect to whom the employer in fact was *not* deprived of his representatives * * *" (Un. Br. 30–31). However, as shown in the Board's brief (Bd. Br. 16–17), while this discipline did not deprive the Employers of the services of those supervisors in this strike, the likely effect of the discipline would be to deprive them of their collective bargaining or grievance adjustment services in future strikes.

Moreover, the Union suggests (Un. Br. 30) that, since the supervisors who refused to cross the picket line were not disciplined, the Employers were not restrained or coerced respecting them. This overlooks that the refusal was attributable to the Union's threat of discipline, which constitutes restraint and coercion within the meaning of Section 8(b)(1)(B) no less than the actual imposition of discipline (Bd. Br. 16). Nor was it necessary to establish that supervisors who refused to cross the picket line "did so out of fear of discipline rather than because of appeals to their union consciousness" (Un. Br. 30). Having unlawfully threatened the supervisors with discipline, the Union has the burden "to disentangle the consequences for which it was chargeable from those from which it was immune" (*National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2)).

argument wholly overlooks the union's coercion, which is what the statute prohibits. A picket line at a struck facility is a general appeal to all persons working at or furnishing supplies and services to that facility to refrain from doing so. See *Steelworkers* v. *National Labor Relations Board,* 376 U.S. 492, 499. A supervisor who honors it without the threat of reprisal does so freely; the employer is thus deprived of the supervisor's services as a result of the supervisor's will rather than union restraint or coercion. But where the supervisor's decision is induced by threats of union discipline it ceases to be a matter of free choice; the employer is thus deprived of the supervisor's services as a result of union restrain or coercion. It is this restraint and coercion that Congress has prohibited, and because of its presence here the union may properly be charged with responsibility for depriving the employer of his selected representative for the purposes specified in Section 8(b)(1)(B).*

The foregoing analysis is not inconsistent with *Local 357, Teamsters* v. *National Labor Relations Board,* 365 U.S. 667, and *National Labor Relations Board* v. *News Syndicate Co.,* 365 U.S. 695 (Un. Br. 20; Am. Br. 22–24). In those cases, the Court held that contract provisions which were lawful on their face (provisions giving the union the exclusive right to refer ap-

* The Union's intent to deprive the Employers of the hyphenates' services is graphically shown by the undisputed record evidence. The Union conducted a special meeting for hyphenates where a Union official emphasized that the strike rules would apply to hyphenates employed in purely supervisory capacities. Union officials also telephoned individual hyphenates before and during the strike to repeat this message (Pet. App. 38a, 42a–43a).

plicants for employment, and requiring all foremen to be union members) could not be found to be discriminatory within the meaning of Section 8(b)(2) of the Act, 29 U.S.C. 158(b)(2), merely because of the possibility that they might be carried out in a discriminatory manner in the future. Here, on the other hand, Section 8(b)(1)(B) is involved, and, in order to establish a violation thereof, it is not necessary to presume that the union will act illegally in the future. The Board, in finding a violation of Section 8(b)(1)(B) here, merely holds the union responsible for the reasonably foreseeable consequences of its admitted acts of discipline and threats thereof directed at the employer's management representatives. Cf. *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 45.

Reliance (Un. Br. 20, 34; Am. Br. 27) upon *National Labor Relations Board* v. *Insurance Agents,* 361 U.S. 477, is also misplaced. In that case, the Court, reversing the Board, held that a union's resort to economic harassment—such as intermittent work stoppages—while otherwise bargaining in good faith did not violate the union's statutory bargaining obligation. The Court believed that, if the Board "in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid," it "would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." *Id.* at 490. No similar danger is present with respect to the Board's interpretation of Section 8(b)(1)(B) in this case.

CONCLUSION

For these reasons, as well as those set forth in our principal brief, the judgment of the court of appeals should be reversed, and the case should be remanded to that court with instructions to enforce the Board's order.

Respectfully submitted.

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